

Protest of) Date: July 15, 1992
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EXPRESS ONE INTERNATIONAL, INC.)
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Solicitation No. ANET-93-01) P.S. Protest Nos. 92-28,
92-30 & 92-35

DECISION

Express One International, Inc. ("Express") has filed three timely protests against several of the terms of Solicitation No. ANET-93-01. Express contends that several provisions in the solicitation are unreasonable, restrictive of competition, and not in the best interests of the Postal Service.

Background

Solicitation No. ANET-93-01, issued April 7, 1992, by the Office of Transportation and International Services, Washington, DC, requests proposals for aviation services to support a transportation network that will link 32 cities across the nation through a Postal Service-owned hub facility at Indianapolis, IN. The network, which will operate at night, is intended to support the Postal Service's Express Mail and Priority Mail product lines. The due date for proposals was initially set for July 6; however this date was changed to June 29, 1992 by Amendment no. 1.^{1/} Section H.2.2.b.2., which required contractors to supply and maintain two fully-crewed B727-200 Stage III^{2/} aircraft for use as "hot spares," stated:

^{1/} Amendment numbers one through five corrected and clarified various solicitation requirements, and additionally included an updated United States Department of Labor Wage Determination report and responses to contractors' questions.

^{2/} "Stage III" refers to Federal Aviation Administration noise-restriction requirements.

In the event the contractor does not provide both of the required hot spares at the beginning of a daily operational cycle, the exact time to be established jointly by the contractor and the Postal Service, the Postal Service will deduct \$10,000 per missing hot spare aircraft for each operational day in which fewer than the prescribed number of aircraft are available for service at the start of the daily cycle.

The solicitation, at section H.2.2.d. Aviation Fuel, provided for reimbursement of fuel as follows:

In general, the Postal Service will reimburse the contractor for the actual fuel cost incurred in the scheduled operation of the aircraft in the network. . . . However, to encourage the efficient procurement and use of fuel by the contractor, the Postal Service will institute an incentive reimbursement program for fuel expenses. If fuel use exceeds a specified quantity during a calendar quarter, the cost of the excess fuel consumed will be borne by the contractor. Conversely, if the contractor uses less fuel than specified for the quarter, a portion of the fuel savings will accrue to the contractor.

In order to determine the amount of fuel reimbursable to the contractor by the Postal Service during each quarter, the solicitation provided for the calculation of a "standard fuel burn" figure. Section H.2.2.d.2., Quarterly Adjustment Based on Standard Fuel Burn, instructed offerors that:

[a]t the end of each postal quarter, the Postal Service will calculate an average daily standard fuel consumption for that quarter, by segment, and a standard total fuel consumption for the quarter, taking into account the segments actually flown during the quarter. . . . The standard fuel consumption shall be based on the average payload of mail, containers, tankered fuel, and spare parts approved by the Postal Service that is actually carried on that segment during the quarter. The flight plans used to determine the standard fuel consumption shall be computed for minimum fuel burn and for typical winds and temperatures for the quarter on each segment, assuming the following: [m]inimum distance routing on approved airways[; s]tandard departure and arrival profiles . . . [; and] 500 pounds of fuel consumed in taxiing at each arrival and departure[.]

Comparison of Actual Fuel Burn with Standard Fuel Burn: At the end of each postal quarter, the Postal Service will compare the total gallons of fuel actually used in Network service during the quarter with the standard total fuel consumption calculated for the quarter.

If the actual total fuel consumption falls between 100 percent and 105 percent of the standard total fuel consumption calculated for the quarter,

the weekly fuel reimbursements during the quarter will remain unchanged.

If the total actual fuel consumption exceeds 105 percent of the total standard fuel burn calculated for the quarter, the cost of the fuel consumption in excess of 105 percent will not be reimbursed by the Postal Service.

If the total actual fuel consumption is less than 100 percent of the total standard fuel consumption calculated for the quarter, the Postal Service will add to subsequent weekly fuel reimbursements an amount determined by multiplying the average fuel cost per gallon during the quarter by one-half the difference between 100 percent of the standard fuel consumption (in gallons) and the total gallons of fuel actually consumed.

The solicitation, at section J.6.b, provided two types of performance incentives: a "service recovery incentive" of 125 percent of block minute value per minute of delay in takeoff that the aviation contractor recovers in arriving at the destination;^{1/} and an "AMF delivery incentive" for exceeding 98 percent on-time delivery at destination air mail facilities ("AMFs") for the period of a week. For performance between 98 and 99 percent, the incentive is \$12,500 per operating week; for performance exceeding 99 percent, the incentive is \$25,000 per operating week. J.6.b.2.

The solicitation, section J.6.c., established the following "performance disincentives:"

1. Service Failure Deduction:

Cancellation or failure of a flight to serve a network station for mechanical or other unauthorized reasons will result in a deduction from the normal compensation of 125 percent of the total dollar value of the affected segment, obtained by multiplying the scheduled block minutes of the segment by the block minutes value plus 25 percent.

2. Late Arrival Deduction:

For each late aircraft arrival at the Hub or outbound intermediate or destination stations, which is unexcusable and caused by circumstances under the aviation contractor's control, the aviation contractor will be assessed as a deduction, the block minute value multiplied by the number

^{3/} "Block minute value" is established by dividing the total annual cost of the aviation contract by the total network annual scheduled block minutes. Section J.6.b. "Block time" is defined as "[t]he time measured from when the aircraft wheels commence rotating at departure until the time the aircraft wheels stop rotating at arrival." Section A.3

of late minutes, plus 25 percent.

Section K.2 indicated that the offeror's technical proposal evaluation would focus on the offeror's approach to executing the Statement of Work and the resources to be utilized. One factor to be evaluated was "cockpit commonality."^{4/} K.2.a.4.

Express filed protests numbered 92-28 and 92-30 with the contracting officer on May 27, 1992, and protest number 92-35 on May 28, 1992.

The Protest

Express asserts that the aviation fuel, service recovery incentive, hot spares, and performance disincentive provisions of the solicitation are unreasonable, unfair, and not in the best interests of the Postal Service; and that the "cockpit commonality" evaluation factor is restrictive of competition. The specific contentions of the protester as to each of these provisions are set out below, followed by the contracting officer's responses.

The contracting officer begins his report with the legal standard which he thinks is applicable to these protests. He asserts that the drafting of technical specifications is primarily a function of the Postal Service's technically qualified experts, and the General Counsel's office should not substitute its judgment on a technical matter in the absence of clear and convincing evidence of an error. E-Z Copy, Inc., P.S. Protest No. 88-61, December 22, 1988; Crown Industries, Inc., P.S. Protest No. 85-40, August 12, 1985; Hydralifts, Inc., P.S. Protest No. 75-41, November 3, 1975. In addition, the technical judgments of technical personnel should not be overruled absent evidence of fraud, prejudice, or arbitrary and capricious action. Crown Industries, Inc., supra.

The contracting officer continues by noting that when a protester asserts that the terms of the solicitation are restrictive of competition, the procuring agency must establish prima facie support for its contention that the restrictions are reasonably related to its needs. But once established, the burden is on the protester to show that the requirements protested are clearly unreasonable. Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984, quoting Amray, Inc., Comp. Gen. Dec. B-208308, 83-1 CPD & 43, January 17, 1983; see also International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989 (citations omitted). As explained below, the contracting officer thinks that each of Express' protests must be denied because its evidence is insufficient under this standard.

1. Sections H.2.2.d. Aviation Fuel and J.6.b. Service Recovery Incentive. Express

^{4/} The contracting officer's report notes that the term "cockpit commonality" is understood in the industry to mean the degree to which aircraft cockpits in a fleet have standardized instrumentation and standardized layout of instruments and controls.

asserts that the aviation fuel reimbursement provisions in conjunction with the fuel burn and performance incentives are ill-conceived, impractical, unfair and counter-productive to the Postal Service's stated objectives in this contract. Express argues that the cost of the increased wear on the engine,^{1/} and the increased fuel consumed when operating an aircraft at the higher cruising speeds necessary to make up for a time delay are much greater than the meager performance bonuses offered. Express suggests that, in order sufficiently to encourage the aviation contractor to make up for lost time, the Postal Service increase the performance bonus substantially, eliminate all fuel burn penalties, and pay for all contractor used and receipted aviation fuel.

The protester also contends that it is "ludicrous" to hold the aviation contractor responsible for unanticipated fuel burn caused by factors beyond the contractor's control, such as air traffic control holds and delays, weather or unusual headwinds, volcanic eruptions and their ash clouds, or acts of God. It explains that the aviation contractor is sufficiently deterred from burning excess fuel by its own financial interests. An aviation contractor wants to fly its planes the fewest miles possible, as increased flight time increases airplane maintenance costs.

The contracting officer states that the fuel reimbursement program, including the "pass through"^{1/} and incentive/disincentive features, has two objectives: to provide fair reimbursement to the contractor for this volatile element of cost, and to protect the Postal Service from excessive fuel usage. The solicitation provides a formula by which the Postal Service will calculate a "standard fuel burn" figure for the network each postal quarter. The aviation contractor may exceed that figure by up to five percent and still pass through all of its fuel costs to the Postal Service. Although the conditions assumed for calculation of the standard fuel burn are favorable conditions, they do not represent the best possible conditions, and do not account for opportunities to conserve fuel, such as the reduced air traffic in night-time operations. Moreover, the Postal Service has found no valid evidence to indicate that the five percent cushion amount is inadequate to cover the weather and air traffic control delays likely to be experienced during night-time operations.

The contracting officer states that the aviation contractor is free to decide on each flight whether the performance incentives are a sufficient inducement to incur additional fuel burn costs in order to make up time. In his judgment, the performance incentives are more than adequate to offset any additional costs that the contractor might incur to earn them.

2. Section K.2.a.4 Cockpit Commonality. The protester contends that using cockpit

^{5/} The protester admitted at its protest conference that the extent to which aircraft engines are damaged when flown at high speeds is an issue of debate within the airline industry.

^{6/} Fuel costs generally are "passed through" to the Postal Service for reimbursement.

commonality as a technical proposal evaluation factor prejudices the outcome of the competition toward only very large competitors. This limits the competition despite the fact that no conclusive evidence exists to prove that cockpit commonality will improve service for the Postal Service and justify the increased cost arising from the limited competition. Express argues that cockpit commonality is only achievable when an airline buys all its aircraft new from the same source or if it goes to the significant expense of overhauling its total fleet and installing new cockpit instruments.

Furthermore, Federal Aviation Administration ("FAA") Category II ("CAT II")^{1/} fleet compliance requirements already require an operator to establish a certain amount of avionics cockpit commonality in order to obtain approval from the carrier's Principal Operations Inspector ("POI") of CAT II landings. No FAA POI is likely to allow more than one CAT II approved approach procedure and avionics setup per type of aircraft with the same operator. Therefore, a cockpit commonality requirement is redundant.^{1/}

The contracting officer responds that there is significant variance in arrangement of cockpit controls and general cockpit layout between aircraft of the same nominal type, and as Category II instrumentation varies between manufacturers, the solicitation's Category II instrumentation requirement, contrary to Express' assertion, will not produce standard cockpits.

Cockpit commonality is desired because it helps make the network safer and more reliable:

1. it reduces the probability of pilot error as pilots are assigned to different aircraft;
2. it reduces the number of spare parts in inventory and increases the likelihood that a replacement part for a failed cockpit-related component will be available when needed; and
3. it increases maintenance standardization, resulting in less downtime and delay when failures occur.

The contracting officer notes that the value of cockpit commonality recently has been demonstrated by the decisions by Federal Express, UPS and Airborne Express to modify and standardize the cockpits of their fleets, which were acquired from various sources with different original cockpit configurations.

^{1/} "CAT II" operation refers to aircraft avionics that enable pilots to land in adverse weather conditions.

^{8/} This argument cuts against Express' conclusion somewhat, since, insofar as a certain level of cockpit commonality is required by the FAA, all technically acceptable offerors will propose at least that level of commonality, making that requirement less prejudicial.

The contracting officer points out that cockpit commonality is but one subfactor among many in the evaluation of technical proposals. Offerors already possessing a fleet of aircraft with common cockpit configurations will have a slight advantage in the evaluation, as will offerors possessing a fleet of B727 aircraft or a high quality maintenance program.

3. Section H.2.2.b.2. Hot Spares. Express argues that the \$10,000 per plane, per day deduction for failing to have in readiness the hot spare aircraft is "grossly excessive," as it is impossible to maintain 100 percent readiness all the time. Each contractor responding to the request for proposals will have to add on to its total price \$10,000 for each of the days it anticipates one or both hot spares might be unavailable. This will only increase the cost of this contract for the Postal Service. The protester contends that there are sufficient disincentives already in the solicitation to cause the contractor to maintain readiness of its hot spares.

The contracting officer states that because of inevitable occasional mechanical or other problems, some of them beyond the control of the contractor, the solicitation requires that 21 aircraft be provided by the contractor to operate the 19 inbound and 19 outbound routes flown each operational day. This leaves the two additional aircraft to be held in reserve each day as hot spares to replace any of the 19 aircraft unable to complete its assigned route.

According to the contracting officer, a prime service objective of the Postal Service is a network with at least 98 percent on-time delivery. It is the Postal Service's judgment that the minimum number of hot spare aircraft necessary to assure performance at the 98 percent level is two. Reducing that number to one would seriously compromise network reliability. The Postal Service has, therefore, established a deduction of \$10,000 per day per aircraft for failure to provide the required two hot spares at the start of the daily cycle. The amount of the deduction reflects the Postal Service's assessment of the reduction in the value of the network due to reduced reliability when one of the hot spares is missing.

The contracting officer disagrees with the protester's contention that other service-based deductions provided elsewhere in the solicitation are sufficient to ensure the availability of two hot spares each night. According to anecdotal information, the current contractor occasionally fails in its contractual obligation to have back-up aircraft to perform the hot spare function despite heavy financial disincentives for service failures. The contracting officer recognizes that the requirement for two hot spares will lead to increased contract costs, but deems the cost necessary in order to assure the level of service performance required by the contract.

4. Section J.6.c. Performance Disincentives. Express also argues that the performance disincentives for failure to serve a network city or for late arrival will do

little to achieve the Postal Service's objective of better service and will only raise costs. The protester additionally contends that late arrivals will be a source of continuing dispute between the Postal Service and the aviation contractor, as fault for a delay is difficult to prove. It argues that the only reasonable disincentive for cancellation or failure to serve a network city is for the Postal Service not to pay the contractor for services not provided.^{9/} Express suggests that the prospect of not being paid for a trip will provide sufficient incentive for the contractor to "correct any correctable problems."

The contracting officer responds that the performance disincentives, together with the service recovery incentive discussed above, are designed to encourage the contractor to comply with the established network schedule and to meet the performance objective of at least 98 percent on-time delivery at the outstation AMFs. The intent of the disincentives is both to compensate the Postal Service for a portion of its damages resulting from late delivery and to motivate the contractor to provide the specified services.

The service failure deduction merely constitutes the compensation that would otherwise be paid to the contractor for the service, plus a modest 25 percent to compensate the Postal Service for any additional costs incurred for extraordinary actions required to meet its service standards or its resulting inability to provide the service expected by its customers. Merely deducting the per trip cost, as proposed by Express, would not compensate the Postal Service for the additional costs incurred or for the damage to the reputation of its products caused by the failure to deliver as promised. The deduction represents a decision to make the contractor bear part of the cost of its failure to perform on time.

Further Comments of the Protester

Responding to the contracting officer's report, Express restates its contention that the performance incentives offered are insufficient, in conjunction with the fuel usage cap, to encourage the aviation contractor to make up for lost time. Express attempts to quantify fuel usage, loss of engine life per hour, and the dollar amount of a performance incentive on a hypothetical flight segment. Express admits that, when looking at fuel alone, there does appear to be a "windfall" for the operator in this hypothetical flight; but asserts that, with the cost of engine use calculated at \$150 per engine per hour while operating at excessive speeds, the windfall disappears.^{10/}

Express argues that the Postal Service did not take into account the number of midwest

^{9/} It is unclear whether the protester is suggesting that the contractor also should be paid nothing when it arrives late.

^{10/} Express explains that the \$150 figure comes from studies conducted by the quality control department of another airline company in the late 1970's.

hub closings that occur each winter in the formulation of its fuel usage cap. Express assumes an average of 4.5 Indiana hub closings in a one-month winter period and extrapolates that the hub closings would likely put an aviation contractor over the five percent fuel cushion one or two months out of the year. The aviation contractor would have to absorb the cost of the excess fuel in those months. The protester reiterates the unfairness of the fuel usage cap and that it is contrary to the contracting officer's stated fuel policy objective for this contract. According to Express, there is sufficient incentive for aviation contractors to limit the operation of their aircraft without the fuel usage cap.

Express disagrees with the contracting officer's arguments about the advantages of cockpit commonality. It argues that companies like Federal Express, UPS, and Airborne gut their twenty year old aircraft and rehabilitate them in order to install new wiring and instruments, not to achieve cockpit commonality, which is only a side effect and not the primary goal in such an overhaul. The protester states that, in its experience, cockpit commonality contributes only minimally to reliability.

The protester reemphasizes its contention that the \$10,000 per day deduction for failing to have both hot spares in order, and the performance disincentives for failure to serve a network city or for late arrival, are arbitrary, will not obtain better performance from the aviation contractor, will cause potentially interested companies not to offer a proposal, and will cause those who do offer a proposal to raise their prices to compensate for the inevitable financial penalties.^{11/}

Express contends that the consultant hired by the Postal Service to assist with the development of the solicitation does not have adequate experience administering aviation contracts and that it has misjudged the effect penalties and disincentives will have on the contractor's performance. Express states that the United States military has experimented with the disincentive "stick" approach to obtaining better reliability and that the military subsequently dropped this approach because it was unproductive and impractical. Express asserts that the U.S. military's civilian airlift contractors perform at a relatively high reliability level without incentives, fines or disincentives.^{12/}

^{11/} Express attached to its comments a copy of a letter from one company indicating that the company will not offer a proposal on this contract because of dissatisfaction with portions of the solicitation.

^{12/} Express has attached to its comments a copy of a form indicating Express' reliability rating of 98.1 for the month of May on a contract it performs for one of the branches of the U.S. military.

Discussion

The determination of the procuring activity's minimum needs, and the technical judgments upon which those determinations are based, are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the services to be procured have been used in the past and will be used in the future. International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989; T.J. O'Brien Company, Inc., et al., P.S. Protest No. 87-83, September 17, 1987; Doehler-Jarvis Division of N.L. Industries, P.S. Protest No. 77-19, July 22, 1977. Express complains that certain requirements of the solicitation do not serve the best interests of the Postal Service, are restrictive of competition, or are unreasonable for various reasons. We have often held that "the drafting of specifications is primarily a function of the Postal Service's technically qualified experts and this office will not substitute its judgment on a technical matter in the absence of clear and convincing evidence of an error." E-Z Copy, Inc., 88-61, December 22, 1988, quoting Crown Industries, Inc., P.S. Protest No. 85-40, August 12, 1985; Hydralifts, Inc., P.S. Protest No. 75-41, November 3, 1975.

When a protester has alleged that a specification is restrictive of competition, contracting officials must establish prima facie support that the restrictions are reasonably related to the Postal Service's needs. Once established, however, the protester must show that the requirements complained of are clearly unreasonable. Pacific Bell, P.S. Protest No. 90-51, December 21, 1990; Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984. If a specification is reasonable, it is not unduly restrictive simply because a particular bidder is unable to meet it. Portion-Pac Chemical Corp., supra; Pacific Bell, supra; International Technology Corporation, supra.

Applying these standards, the protester's challenges to the various solicitation provisions as not serving the interests of the Postal Service or as unduly restrictive or unreasonable fail. The contracting officer has explained the rationale behind the combination of the fuel reimbursement provision, with its cap on fuel expenditures reimbursable by the Postal Service, and the service recovery incentive. The Postal Service seeks to achieve 98 percent on-time delivery, while at the same time containing its costs. These provisions represent decisions made by Postal Service technical personnel as to how best to achieve its competing goals. Express strongly disagrees with the conclusions of the contracting officer regarding what provisions best would accomplish the Postal Service's goals, but falls short of demonstrating that the judgment of the technical personnel was clearly unreasonable.^{13/}

^{13/} The arguments presented by the protester as to why the fuel usage and service recovery provisions will not accomplish what the Postal Service intends, and how the Postal Service better could accomplish its goals, represent factual disputes. "[O]ur bid protest forum, unlike a judicial one, is ill-suited to resolving factual disputes, as we cannot conduct adversary functions to any significant extent or degree. In a factual dispute we adopt the contracting officer's position absent sufficient evidence to overcome

The contracting officer has enunciated grounds for using cockpit commonality as an evaluation factor, which serve to establish the prima facie support necessary to justify the provision. The contracting officer asserts that cockpit commonality will make the network safer and more reliable, and cites several reasons such commonality will promote safety and reliability. The question then becomes whether cockpit commonality, as an evaluation factor, is clearly unreasonable.

Express has not shown that using cockpit commonality as an evaluation factor is clearly unreasonable. The protester's assertions that no conclusive evidence exists to prove that cockpit commonality will improve service for the Postal Service and justify the increased cost, and that evaluation of offers will be slanted toward large competitors, fall short of meeting its burden.^{14/} Furthermore, the evaluation factors in the solicitation need only fairly advise prospective offerors of the basis on which their offers will be considered for award. International Technology Corporation, supra.

The contracting officer believes that cockpit commonality will contribute to the reliability and safety of the network, which is reasonably related to the Postal Service's needs. Whether cockpit commonality actually will or will not contribute to reliability and safety is a factual dispute, and we adopt the contracting officer's position as Express has not presented sufficient evidence to overcome the presumption of correctness that attaches to the contracting officer's conclusion.

The provision for a \$10,000 deduction whenever a hot spare is unavailable for service also is reasonably related to the Postal Service's goal of achieving 98 percent on-time delivery. Express offers only its opinion as evidence that the deduction will not achieve its intended function. The protester's arguments amount to a factual dispute as to whether the specifications actually will have the effect that the Postal Service intends, i.e. increasing the probability of 98 percent on-time delivery; however, Express has failed to overcome the presumption of correctness that attaches to the contracting officer's determination.

The performance disincentives for failure to serve a network city or for late arrival are intended to increase the probability of 98 percent on-time delivery, and are, therefore, reasonably related to the needs of the Postal Service. Express disagrees that the disincentives will have the intended effect. Clearly, reasonable minds may differ on
(..continued)

the presumption of correctness which attaches to the contracting officer's action." Cohlma Airline, Inc., P.S. Protest No. 87-118, April 13, 1988 (and cited cases). The Postal Service has decided its requirements in this regard and Express has not provided evidence sufficient to overcome the presumption of correctness that attaches to the contracting officer's conclusions.

^{14/} We note that Express is in no way precluded from offering a proposal for this contract if its fleet has a low level of cockpit commonality. As the contracting officer explained, this is but one subfactor in the technical evaluation.

how best to obtain the desired 98 percent on-time delivery. Nevertheless, this office will not substitute its judgment for that of the technical personnel absent clear evidence that the specification is without a reasonable basis. Express has failed to carry its burden of proof and, therefore, its challenge to the specification requirements must be denied.

The protests are denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law